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No. 86-1627

In the Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF ANGOON, ET AL., PETITIONERS

v.

DONALD HODEL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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25 pp

QUESTIONS PRESENTED

1. Whether the Corps of Engineers' grant of a permit under Section 404 of the Clean Water Act (33 U.S.C. 1344) for the construction of a breakwater in navigable waters is a disposition of a property interest of the United States that requires the preparation of a subsistence evaluation under Section 810 of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), Pub. L. No. 96-487, 94 Stat. 2427.

2. Whether Section 503(d) of ANILCA (94 Stat. 2400), which prohibits the sale or harvesting of timber within the Admiralty Island National Monument in Alaska, applies to the privately owned land of respondent Shee Atika, an Alaska Native Corporation.

3. Whether the court of appeals erred in directing the entry of summary judgment for respondents on petitioners' claim under the National Environmental Policy Act, based on a determination that there were no remaining issues of material fact.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 803 F.2d 1016. A prior opinion of the court of appeals is reported at 749 F.2d 1413 (1985). The opinions of the district court (Pet. App. D1-D16, E1-E16, F1-F5) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1) was entered on October 31, 1986, and a timely petition for rehearing was denied on December 1, 1986 (Pet. App. C1). By orders dated February 18, March 17, and March 27, 1987, Justice O'Connor extended the time within which to file the petition for a writ of certiorari to and including April 10, 1987. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1971, Congress enacted the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*, to settle the aboriginal claims of Alaskan Natives. "ANCSA authorized the payment of almost $1 billion cash and the conveyance of approximately 40 million acres of land to Alaskan Natives as compensation for extinguishment of their claims and to assist them in achieving financial independence and self-sufficiency." *City of Angoon* v. *Marsh*, 749 F.2d 1413, 1414 (9th Cir. 1984) (*Angoon I*). Respondent Shee Atika, Inc., is an Alaska Native Corporation established to receive and administer the ANCSA benefits of the Natives of Sitka, Alaska. The only benefit Shee Atika received under ANCSA was the right to the surface estate in up to 23,040 acres of land. 43 U.S.C. 1613(h)(3). In 1975, Shee Atika selected land on the southwest portion of Admiralty Island, near the community of Angoon. The Sierra Club and Kootznoowoo, Inc., a Native Corporation representing the Natives of Angoon, immediately filed suit to challenge this selection (Pet. App. A4).

Congress sought to resolve this controversy by enacting Section 506(c) of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), Pub. L. No. 96-487, 94 Stat. 2409. Section 506(c) provided that the Secretary of the Interior, upon passage of ANILCA, "shall convey" to Shee Atika equivalent acreage on the northwest portion of Admiralty Island, adjacent to Cube Cove, in satisfaction of Shee Atika's rights under ANCSA. Shee Atika in turn was required to release its claim to the lands it had selected on the southwest portion of the Island. 94 Stat. 2411. The Cube Cove lands are farther from Angoon and less environmentally sensitive than Shee Atika's original selection (Pet. App. A4). In ANILCA, Congress also designated most of the rest of Admiralty Island as the Admiralty Island National Monument. See § 503(b), 94 Stat. 2399.

Despite Congress's directive, petitioners challenged the Secretary's conveyance of the land adjacent to Cube Cove (Pet. App. A5). The Sierra Club also filed a notice of *lis pendens* in the Alaska land records, which prevented Shee Atika from obtaining financing for its timber development plans at the new site (*ibid.*). Congress responded to this renewed challenged to Shee Atika's plans by enacting Section 315 of the Interior Appropriations Act for 1983, Pub. L. No. 97-394, 96 Stat. 1998, which confirmed "in all respects" the title conveyed by the Secretary pursuant to Section 506(c) of ANILCA. The Explanatory Statement prepared by the Senate Committee on Appropriations stated (128 Cong. Rec. S14303 (daily ed. Dec. 9, 1982)):

> By section 506(c) of [ANILCA], Congress directed title to certain lands be conveyed to Shee Atika, Inc. Congress intended to settle pending litigation concerning the validity of certain withdrawals pursuant to the Alaska Native Claims Settlement Act. It was noted that Shee Atika received no funds under the Settlement Act, because of the lawsuit [it] had not yet received its land entitlement[,] and without a legislative solution Shee Atika could go bankrupt (S. Rept. No. 96-413, pp. 214-215). * * *
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> * * * The purpose of this provision is to make clear that the title conveyed pursuant to section 506(c) is valid, conveyed pursuant to the Settlement Act and that the land is to be developed by Shee Atika for its economic growth and stability.

2.a. Notwithstanding Congress's action, petitioners filed yet another challenge to Shee Atika's plans, alleging that the proposed development of its land violated, inter alia, Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C); the subsistence protection provisions of Section 810 of ANILCA, 94 Stat. 2427, 16 U.S.C. 3120; Sections 402 and 404 of the Clean Water Act, 33 U.S.C. 1342 and 1344; and

federal trust responsibilities to the Natives of Angoon. Petitioners' primary claim under NEPA was that an environmental impact statement (EIS) was required for the permit issued by the United States Army Corps of Engineers, pursuant to Section 404 of the Clean Water Act, 33 U.S.C. 1344, for a log-transfer facility on Cube Cove. This facility will be used by Shee Atika to place harvested timber into the waters of the Cove, where it then can be bundled into rafts and towed away. A permit is required because the log-transfer facility includes a breakwater that extends into navigable waters. Pet. App. A5.

b. The federal defendants agreed to suspend the Section 404 permit and prepare an EIS. Shee Atika proceeded to harvest timber by other means that did not require placing a structure in navigable waters. Angoon then obtained a preliminary injunction barring even that activity. The injunction was based on the theory that Section 503(d) of ANILCA, 94 Stat. 2400, which prohibits the Secretary of Agriculture from permitting the sale or harvesting of timber "[w]ithin the Monument[]," applies to private lands as well as public lands that fall within the outer boundaries of the Admiralty Island National Monument. The court of appeals reversed the preliminary injunction. *Angoon I, supra.* It reasoned that Section 503(b) of ANILCA specifies that the Admiralty Island National Monument shall consist of "approximately 921,000 acres of *public lands*" (94 Stat. 2399 (emphasis added)), and therefore does not include private lands (749 F.2d at 1416). In the court's view, the text and legislative history of other provisions of ANILCA likewise made it "clear that Congress intended that the private status of the lands conveyed to Shee Atika is to remain unaffected by their inclusion within the exterior boundaries of the conservation system unit on Admiralty Island" (*Angoon I*, 749 F.2d at

1418). The court also found it "inconceivable that Congress would have extinguished [Shee Atika's] aboriginal claims and insured their economic well being by forbidding the only real economic use of the lands so conveyed" (*ibid.*).

c. On remand, petitioners filed a consolidated complaint challenging the legality of the conveyance to Shee Atika, the permits for the log-transfer facility, and Shee Atika's timber operations. The federal defendants moved for summary judgment on all claims at issue here (E.R. 111-112[1]), and Shee Atika moved for dismissal or summary judgment on all claims (E.R. 113). Petitioners moved for summary judgment on the bulk of their claims (E.R. 108-109, 114-117). With respect to NEPA, petitioners maintained that the EIS did not adequately consider alternatives to the log-transfer facility (E.R. 115-117). Although petitioners alleged that they had other grounds for challenging the EIS that would require discovery (see page 15, *infra*), they did not identify those other grounds.

The district court granted partial summary judgment to petitioners on their claim that the Section 404 permit for the log-transfer facility was invalid under NEPA, on the ground that the EIS did not study the alternative of having Shee Atika exchange its Admiralty Island tract for land located elsewhere in Alaska (Pet. App. D8-D15). The court dismissed or granted summary judgment in favor of

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[1] "E.R." refers to the Excerpts of Record filed in the court of appeals. The federal defendants' summary judgment motion did not apply to claims relating to the issuance of a National Pollutant Discharge Elimination System (NPDES) permit for the log-transfer facility, pursuant to Section 402 of the Clean Water Act, 33 U.S.C. 1342. Those claims have been stayed pending resolution of an administrative appeal that is still pending before the Environmental Protection Agency. Pet. App. D7.

the defendants on all other claims. The court then entered a partial final judgment under Fed. R. Civ. P. 54(b). See Pet. App. F1-F5.

d. The court of appeals reversed the district court's order insofar as it declared the Section 404 permit void on NEPA grounds, observing that the Corps of Engineers had spent 19 months preparing an EIS that was "technically sophisticated and analytically rigorous" (Pet. App. A8-A9). In particular, the court of appeals sustained the Corps' reasons for not giving more extensive considerations to the alternative of a possible exchange of Shee Atika's current holding. The court explained (i) that the exchange alternative would not satisfy the specific purpose for which the Section 404 permit was sought, *viz.*, facilitating timber harvesting on Shee Atika's present land; (ii) that the exchange alternative was speculative because it was dependent upon action by Congress, which had only recently directed and then ratified the conveyance of that land to Shee Atika; and (iii) that the Corps was justifiably reluctant to deny a Section 404 permit merely to force Shee Atika to agree to exchange its present holding for land elsewhere (Pet. App. A9-A11). Finding no remaining issues of material fact regarding the validity of the EIS, the court of appeals directed summary judgment for the defendants on the question of the validity of the log-transfer facility permit under Section 404 (Pet. App. A12).

The court of appeals affirmed the district court's order in all other respects (Pet. App. A13-A25). First, the court reaffirmed its holding in *Angoon I* that Section 503(d) of ANILCA prohibits timber harvesting only on the public lands that constitute the National Monument, noting that "reading section 503(d) to prohibit logging on [Shee Atika's] Cube Cove inholding would forbid the land's only real economic use and defeat the purpose of section 506(c)'s conveyance of the land" (Pet. App. A15-A16). Second, the court rejected petitioners' claims under Section 810 of

ANILCA, 94 Stat. 2427, which requires a subsistence evaluation if a federal agency proposes to "withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands." The court held that Section 810 is inapplicable because Shee Atika's land is privately owned and because the United States has no ownership interest in the waters of Cube Cove, in which the breakwater for the log-transfer facility would be constructed (Pet. App. A22 n.6).[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. In fact, petitioners do not seek review on the principal issue they raised in the courts below—that the Corps of Engineers, in preparing the EIS, should have considered the alternative of exchanging Shee Atika's current tract for land elsewhere in Alaska. Furthermore, the decision below arises in unique circumstances that have been repeatedly addressed by Congress for the specific purpose of resolving objections to Shee Atika's acquisition and development of its land on Admiralty Island. Review by this Court therefore is not warranted.

1. Petitioners first contend (Pet. 7-15) that Section 810 of ANILCA applies to the Corps' grant of a permit under Section 404 of the Clean Water Act. Section 810 requires the federal agency having "primary jurisdiction" over public lands that are proposed for disposition to evaluate the subsistence effects of the disposition. However, Section 810 by its terms applies only to "public lands," which term

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[2] The court also rejected petitioners' claim, not renewed here, that Shee Atika's timber harvesting is barred by time limitations in Section 22(k) of ANCSA, 43 U.S.C. 1621(k) (Pet. App. A17-A21). Petitioners' petition for rehearing was denied on December 1, 1986, in an order directing the mandate to issue forthwith (Pet. App. C1).

is defined in Section 102 of ANILCA to mean "land[s] situated in Alaska which * * * are Federal lands" (94 Stat. 2375, 16 U.S.C. 3102). "Federal land" is defined to mean "lands the title to which is in the United States," and the term "lands" includes "lands, waters, and interest therein." 94 Stat. 2375, 16 U.S.C. 3102(2) and (1). See *Amoco Production Co.* v. *Gambell*, No. 85-1239 (Mar. 24, 1987), slip op. 14. Petitioners' theory is that the navigational servitude in the waters of Cube Cove is in the nature of a proprietary "interest" in water, the title to which is in the United States, thereby rendering the servitude itself "public lands" for purposes of ANILCA. See Pet. 15. The court of appeals correctly rejected this novel proposition (Pet. App. A22 n.6).

In *United States* v. *Twin City Power Co.*, 350 U.S. 222, 224 (1956), this Court explained:

> The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That Clause speaks in terms of power, not of property.

See also *United States* v. *Virginia Elec. & Power Co.*, 365 U.S. 624, 627-628 (1961), quoting *United States* v. *Commodore Park*, 324 U.S. 386, 390 (1945) (the navigational servitude arises from the "power of the government to control and regulate navigable waters in the interest of commerce"). The United States of course may choose to waive its power to regulate navigable waters or may permit certain obstructions to navigation. *Twin City Power*, 350 U.S. at 228. But the United States clearly does not grant title to an interest in property when it permits a party to place a breakwater in navigable waters. "[T]hat the running water in a great navigable stream is capable of private ownership is inconceivable." *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 69 (1913); see also *Twin City Power*, 350 U.S. at 228; *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179 (1979).

Contrary to petitioners' contention (Pet. 12-15), the Submerged Lands Act of 1953, 43 U.S.C. 1301 *et seq.*, confirms that the navigational servitude is not a species of property.[3] Section 3(a) of the Submerged Lands Act, 43 U.S.C. 1311(a), vested in the States the "title to and ownership of the lands beneath navigable waters within [their] boundaries * * * and the natural resources within such lands and waters * * * ." Section 5(a), 43 U.S.C. 1313(a), excepted from this grant any lands and resources the "title to which has been lawfully and expressly acquired by the United States" or in which the United States otherwise retained a property interest. See *United States* v. *California,* 436 U.S. 32, 38 (1978). Significantly, however, the navigational servitude was protected not by Section 5(a), but by Section 6(a) of the Submerged Lands Act, 43 U.S.C. 1314(a), which reserved to the United States the "navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs." Section 6(a) expressly provided that this reservation shall *not* be deemed to include "proprietary rights of ownership * * *." Thus, Congress distinguished between the Federal Government's retention of property interests and its retention of regulatory powers, and Congress placed the navigational servitude in the latter category. See *United States* v. *California,* 436 U.S. at 41 & n.18. This pre-existing statutory distinction reinforces the conclusion that the navigational servitude likewise was not intended by Congress to be among the interests in property covered by Section 810 of ANILCA.

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[3] As the Court noted in *Gambell,* slip op. 14, the Submerged Lands Act applies to Alaska by virtue of Section 6(m) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 343.

The decision in *Gambell* also supports this conclusion. The Court there held that the grant of oil and gas leases on the Outer Continental Shelf (OCS) is not subject to Section 810 of ANILCA because the OCS is not "in Alaska," as required by Section 102(3), 94 Stat. 2375, 16 U.S.C. 3102(3). Significantly, however, the Court also explained that Congress could not have intended Section 810 to apply to the OCS for an additional reason (slip op. 19):

> Section 810 places the duty to perform a subsistence evaluation on "the head of the Federal agency having primary jurisdiction over such lands." Unlike onshore lands, no federal agency has "primary jurisdiction" over the OCS; agency jurisdiction turns on the particular activity at issue. See G. Coggins & C. Wilkinson, Federal Public Land and Resources Law 434 (1981).

As with the OCS, federal responsibility over waters in the three-mile coastal zone is divided among various agencies: navigation in coastal waters is subject to Coast Guard regulation; fishery resources are regulated by the National Marine Fisheries Service of the Department of Commerce (and in some instances by the Fish and Wildlife Service of the Department of the Interior); discharges of pollutants are regulated by the Environmental Protection Agency; and obstructions to navigable capacity must be approved by the Corps of Engineers. None of these agencies has "primary jurisdiction" over the coastal waters of Alaska.

Petitioners rely (Pet. 12) on the statement in *Gambell* that "[t]he United States may not hold 'title' to the submerged lands of the OCS, but we hesitate to conclude that the United States does not have 'title' to any 'interests therein' " (slip op. 16 n.15). That passage, however, referred not to the navigational servitude, but to mineral interests leased by the Untied States. The United States does not have any mineral interests in the three-mile coastal zone granted to the State by the Submerged Lands Act,

and no such interests would be implicated in any event by the construction of the log-transfer facility for which Shee Atika sought a permit under Section 404.

Nor does *United States* v. *Cherokee Nation,* No. 85-1940 (Mar. 31, 1987), suggest that the navigational servitude is a property interest for purposes of Section 810 of ANILCA. As petitioners concede (Pet. 15), the Court in *Cherokee Nation* found the source of the navigational servitude to be the Commerce Clause (see slip op. 4), not the Property Clause. Petitioners therefore err in reading (Pet. 17) *Cherokee Nation* to hold that the navigational servitude is a property interest that could be conveyed to a private party. Instead, the Court simply suggested that the Cherokee Nation could have been (but was not) granted "an exemption from the servitude," through a "waiver of sovereign authority" (slip op. 7). This language is fully consistent with the character of the navigational servitude as a regulatory power.

2. The court of appeals correctly rejected petitioners' contention (Pet. 17-19) that Shee Atika's private land on Admiralty Island is governed by Section 503(d) of ANILCA, which provides that "[w]ithin the Monuments, the Secretary [of Agriculture] shall not permit the sale o[r] harvesting of timber" (94 Stat. 2400). As the court of appeals observed in *Angoon I* (749 F.2d at 1416), Section 503(b) defines the Admiralty Island National Monument as consisting of "approximately 921,000 acres of *public lands*" (emphasis added). Shee Atika's lands are private, not public, and they therefore are not part of the National Monument and are not subject to the prohibition against timber harvesting "within the Monument[]." This interpretation is supported by Section 103(c) of ANILCA, 94 Stat. 2377, 16 U.S.C. 3103(c), which states that "[o]nly those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of

such unit." Furthermore, the legislative history makes clear that "inclusion of these Native lands within the boundaries of conservation system units is not intended to * * * restrict use of such lands by the owning Corporations nor to subject the Native lands to regulations applicable to the public lands within the specific conservation system unit" (125 Cong. Rec. 9905 (1979) (remarks of Rep. Udall) (quoted in *Angoon I,* 749 F.2d at 1417)). Indeed, as the court of appeals observed (Pet. App. A15-A16; *Angoon I,* 749 F.2d at 1418), application of the timber-harvesting prohibition to Shee Atika's land would deprive that land of its only real economic use, and would thereby frustrate Congress's purpose of promoting "economic growth" when it provided for and then ratified the exchange of Shee Atika's original ANSCA selection for the tract at issue here. See page 3, *supra.*[4]

Gambell does not support petitioners' contention that both public and private lands are subject to the timber-harvesting prohibition in Section 503(d). In *Gambell,* the Court concluded that the term "in Alaska," as used in Section 102(3) of ANILCA, does not include the OCS, which by definition is outside Alaska. Slip op. 14. But the Court did not suggest that Congress's use of the phrase "in Alaska" was intended to subject *all* lands within the boundaries of the State, private as well as public, to the subsistence-evaluation provisions of Section 810 of ANILCA. To the contrary, the Court recognized (slip op.

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[4] Section 503(d) states that "the Secretary shall not permit" the sale or harvesting of timber. This language does not impose a prohibition directly on private parties with respect to their private affairs, but rather imposes a duty on the Secretary with respect to matters under his jurisdiction. As the court below recognized in *Angoon I* (749 F.2d at 1416), the Secretary of Agriculture does not have jurisdiction to manage private lands in general (see 16 U.S.C. 1609(a)) or the private lands conveyed to a Native Corporation in particular (see 43 U.S.C. 1621(i)).

13-14) that Section 810 applies only to "public lands" (94 Stat. 2399). Similarly, Section 503(a) of ANILCA defines the Admiralty Island National Monument as consisting only of "public lands." The parallel reach of Section 810, as construed in *Gambell,* therefore supports, rather than undermines, the court of appeals' interpretation of Section 503(d).[5]

3. Petitioners' remaining contention (Pet. 19-25)—that the court of appeals erred in directing entry of summary judgment for the respondents on the issue of the adequacy of the EIS (Pet. App. A3)—likewise does not warrant review. Although the district court found the EIS inadequate (and granted summary judgment for petitioners) on the ground that the Corps had failed to consider the alternative of exchanging Shee Atika's current holding for other land, the court of appeals reversed and held that the Corps was not required to consider that alternative further. Petitioners expressly do not seek review on that issue. See Pet. 7 n.4. Instead, petitioners object to the court of appeals' ruling insofar as it disposes of other possible objections they might have had to the EIS. That ruling, however, was entirely appropriate.

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[5] The decision below also does not conflict with *Minnesota* v. *Block,* 660 F.2d 1240, 1248 n.15 (8th Cir. 1981), cert. denied, 455 U.S. 1007 (1982), cited by petitioners (Pet. 18-19). That case construed Section 4 of the Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-495, 92 Stat. 1650, which prohibits motorboats "within the wilderness" created by the Act. The Eighth Circuit observed that this prohibition must apply to waters under state jurisdiction in order for the prohibition to have any meaning, "[i]nasmuch as all navigable waters within the area fall under state jurisdiction." 660 F.2d at 1248 n.15. The court also found that certain exemptions contained in Section 4 of the Boundary Waters Act would make no sense unless all waters within the area were covered by the prohibition (ibid.). These considerations are not presented by Section 503(d) of ANILCA. To the contrary, as noted above (see pages 11-12, *supra*), the language and legislative history of ANILCA affirmatively demonstrate that Shee Atika's private holding was not intended to be subject to restrictions applicable to the Admiralty Island National Monument.

a. The court of appeals was presented with a controversy that had been the subject of litigation for 12 years. That litigation had deprived Shee Atika of the compensation Congress afforded it under ANSCA for the extinguishment of its aboriginal claims (Pet. App. A4), despite Congress's actions in 1980 and 1983 to ensure that Shee Atika would realize the economic benefits of the very tract at issue in this case. The court of appeals had authority under 28 U.S.C. 2106 to direct the entry of a judgment "as may be just under the circumstances." In the circumstances of this case, it clearly was "just" to resolve the EIS adequacy issue in its entirety, rather than to remand to the district court based on speculation that petitioners might come up with new theories to attack the EIS, and thereby further frustrate Shee Atika's ability to make economic use of its lands.

The 120-page EIS and all relevant parts of the administrative record were before the court of appeals, which reviewed the EIS and found it "technically sophisticated and analytically rigorous" (Pet. App. A8-A9).[6] Furthermore, petitioners had ample opportunity to develop other challenges to the EIS, yet failed to do so. A draft EIS concerning the log-transfer facility had been distributed for public comment in March 1984, and after public hearings, the final EIS was issued in October 1984 (E.R. 139, 293). Comments on the final EIS were accepted until December 17, 1984 (E.R. 139). Petitioners filed their consolidated complaint on April 29, 1985, more than four months later (Pet. App. A6). That complaint alleged that

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[6] It has long been accepted practice to resolve EIS inadequacy claims on summary judgment motions that attach the administrative record. See, *e.g.*, *National Center for Preservation Law* v. *Landrieu*, 496 F. Supp. 716, 737-738 (D.S.C.), aff'd, 635 F.2d 324 (4th Cir. 1980); *Upper Westfork River Watershed Ass'n* v. *Corps of Engineers*, 414 F. Supp. 908, 922 (N.D. W.Va. 1976), aff'd, 556 F.2d 576 (4th Cir. 1977), cert. denied, 434 U.S. 1010 (1978).

the Corps of Engineers issued an EIS on the log-transfer facility "without studying the reasonable alternative of an exchange of the Cube Cove lands for other timber lands located off of Admiralty Island, and otherwise without complying to the fullest extent possible with NEPA" (E.R. 14). But petitioners never specified in what respects the EIS was "otherwise" defective under NEPA.

Both the federal defendants and Shee Atika moved for summary judgment on petitioners' entire NEPA claim. See page 5, *supra*. Petitioners filed a cross-motion for summary judgment on the NEPA claim insofar as it was based on the exchange alternative, and they opposed respondents' motion for summary judgment on other aspects of the NEPA claim. But in so doing, petitioners did not file affidavits pursuant to Fed. R. Civ. P. 56(e) to demonstrate the existence of a genuine issue of material fact regarding other possible defects in the EIS. The court of appeals therefore did not have before it a record that either identified other specific defects in the EIS or demonstrated the existence of a genuine issue of material fact pertaining to any such defect.

Counsel did file an affidavit in district court, pursuant to Rule 56(f), stating that petitioners could not at that time present facts essential to justify their opposition to petitioner's motion. Affidavit of Lewis F. Gordon, dated 6/18/85. Even then, however, counsel did not identify any specific ground (other than the alleged failure to consider the exchange alternative) on which their opposition to the defendants' motions for summary judgment might be based. Counsel merely suggested in general terms that there were disputed facts concerning the "environmental and subsistence effect of the project" (*id.* at 3) and indicated that petitioners would seek discovery of such facts. Petitioners' submission under Rule 56(f) was addressed to the discretion of the court. See 6 J. Moore & J. Wicker, *Moore's Federal Practice* § 56.24, at 56-1424 to 56-1425,

56-1437 to 56-1438 (2d ed. 1987); *VISA Int'l Service* v. *Bankcard Holders,* 784 F.2d 1472, 1475 (9th Cir. 1986); *SEC* v. *Spence & Green,* 612 F.2d 896, 901 (5th Cir. 1980), cert. denied, 449 U.S. 1082 (1981). For at least three reasons, the court of appeals did not abuse its discretion by declining to accept counsel's affidavit under Rule 56(f) as a basis for still further proceedings and attendant delay. First, when counsel executed the affidavit on June 18, 1985, petitioners already had had at least seven months since the filing of the final EIS (and 14 months since the filing of the draft EIS) during which they could have developed facts concerning other possible defects in the EIS, through discovery or otherwise. Indeed, if petitioners disagreed with the "methodology and data" in the EIS, as they now vaguely claim (Pet. 21 n.20), they should have raised that issue with the Corps of Engineers during the comment period on the draft EIS. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553-554 (1978). Second, petitioners have not initiated discovery with respect to any other objections to the EIS since June 1985. Third, petitioners have not in any event identified a specific legal question regarding the adequacy of the EIS to which any facts that might be developed through discovery would be material.

Against this background, it appears that the discovery petitioners contemplate would be nothing more than a fishing expedition, based on speculation that a basis for some other objection to the EIS (and to the defendants' motions for summary judgment) might surface. See *First Nat'l Bank* v. *Cities Service Co.,* 391 U.S. 253, 298 (1968); *Bettin* v. *Nelson,* 744 F.2d 53, 58 (8th Cir. 1984); *Taylor* v. *Gallagher,* 737 F.2d 134, 137 (1st Cir. 1984); *Mid-South Grizzlies* v. *Nat'l Football League,* 720 F.2d 772, 779-781 (3d Cir. 1983), cert. denied, 467 U.S. 1215 (1984); *Exxon Corp.* v. *FTC,* 663 F.2d 120, 127-128 (D.C. Cir. 1980); *Contemporary Mission, Inc.* v. *USPS,* 648 F.2d 97,

106-107 (2d Cir. 1981). Petitioners might have preferred to hold in reserve the possibility of mounting a different attack on the EIS should their argument concerning the exchange alternative fail, so that they might further delay the resolution of this case and the economic development of Shee Atika's land. But the court of appeals surely was not required to countenance such a piecemeal attack on the EIS.

b. Contrary to petitioners' contention (Pet. 23-24), this case is readily distinguishable from *Fountain* v. *Filson,* 336 U.S. 681 (1949). There, the court of appeals directed the entry of summary judgment "on a new issue as to which the opposite party had no opportunity to present a defense before the trial court" (*id.* at 683). Here, by contrast, the adequacy of the EIS as a whole was put in issue by the respondents' motions for summary judgment. Petitioners could have defended against those motions by developing their unspecified NEPA claims.

The decision below also is consistent with other cases in which courts of appeals have found it appropriate to direct the entry of summary judgment where the record disclosed no genuine issue of material fact. See *Viger* v. *Commercial Insurance Co.*, 707 F.2d 769, 774 (3d Cir. 1983); *Morgan Guaranty Trust Co.* v. *Martin,* 466 F.2d 593, 599-600 (7th Cir. 1972); *Stein* v. *Oshinsky,* 348 F.2d 999, 1002 (2d Cir. 1965); see also 6 *Moore's Federal Practice, supra,* § 56.27[1], at 56-1560; 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure, Civil 2d* § 2716, at 660-662 (2d ed. 1983). Indeed, in *Kern County Land Co.* v. *Occidental Corp.,* 411 U.S. 582, 590-591 (1973), this Court sanctioned the court of appeals' direction of summary judgment for the appellant, despite the appellant's failure even to move for summary judgment in the district court. 411 U.S. at 604 n.31; *id.* at 614 (Douglas, J., dissenting). Petitioners conceded below that a court of appeals

has the power under 28 U.S.C. 2106 to direct the entry of summary judgment in appropriate circumstances. See Reh'g Pet. 6. They therefore merely argue that the court of appeals should not have done so in the particular circumstances of this case. Moreover, as petitioners concede (Pet. 22 n.21), the paragraph in the court of appeals' opinion directing that summary judgment be entered for respondents on the NEPA claim is not accompanied by any discussion of the various issues petitioners discuss, and it therefore is of little or no precedential value with respect to them. Review by this Court therefore is particularly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1987

U.S. GOVERNMENT PRINTING OFFICE: 1986—181-483/40394